



**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD**

CRIMINAL APPEAL NO. 177 OF 2019

1. Pampya Damu Shinde
Age: 30 years, Occu.: Labour,
R/o Manmodi, Tq. Tuljapur,
Dist. Osmanabad
2. Tunya @ Premchand Damu Shinde
Age: 32 years, Occu.: Labour,
R/o Manmodi, Tq. Tuljapur,
Dist. Osmanabad

..APPELLANTS

VERSUS

State of Maharashtra
Through Police Inspector
Police Station Tamalwadi,
Dist. Osmanabad

..RESPONDENT

**AND
CRIMINAL APPEAL NO. 646 OF 2019**

Balaji Shivaji Kale
Age: 32 years, Occu.: Labour,
R/o Baswantwadi, Tq. Tuljapur,
Dist. Osmanabad

..APPELLANT

VERSUS

State of Maharashtra
Through Police Inspector
Police Station Tamalwadi,
Dist. Osmanabad

..RESPONDENT

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Mr. N.S. Ghanekar, Advocate h/f Mr. S.P. Bhadge and Mr. S.S. Mhase,
Advocates for appellants
Mr. S.R. Wakle, A.P.P. for respondent - State
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**CORAM : R.G. AVACHAT AND
NEERAJ P. DHOTE, JJ**
RESERVED ON : 11th MARCH, 2024
PRONOUNCED ON : 12th APRIL, 2024

JUDGMENT (PER : R.G. AVACHAT, J.) :

1. Both these appeals are being decided by this common judgment since the challenge therein is to one and the same judgment and order of conviction and consequential sentence dated 04th February, 2019 passed by Special Judge, MCOC Act, Aurangabad in Special Case No. 2 of 2015. The details of conviction and consequential sentence imposed against the appellants are as under :-

Section	Act	Sentence
396	IPC	Life Imprisonment, Fine of Rs.1,000/- each, In default, Simple Imprisonment for 15 days
397	IPC	Imprisonment for 7 years, Fine of Rs.1,000/- each, in default, Simple Imprisonment for 15 days
3(1)(i)	MCOC Act	Life Imprisonment, Fine of Rs.1,00,000/- each, in default, Simple Imprisonment for 2 ½ years
3(2)	MCOC Act	Imprisonment for 5 years, Fine of Rs.1,00,000/- each, in default, Simple Imprisonment for 2 ½ years
3(3)	MCOC Act	Imprisonment for 5 years, Fine of Rs.1,00,000/- each, in default, Simple Imprisonment for 2 ½ years
3(4)	MCOC Act	Imprisonment for 7 years, Fine of Rs.5,00,000/- each, in default, Simple Imprisonment for 3 ½ years

The substantive sentences are directed to run concurrently.

2. Facts, as are disclosed from the police papers (charge-sheet) and the evidence before the trial Court, are as under :-

P.W.1 - Jayaji (informant) is the resident of Yemgarwadi, Tq. Tuljapur. Agriculture was his profession. Adjoining the land of the informant there was a land belonging to one Pandurang Jogdand. Pandurang has three sons. They were not residing at Yemgarwadi. Two of them were in Pune. Another son, P.W.2 – Sakharam would run a shop at Ausa, Dist.

Latur. The sons would occasionally visit their parents. As such, Sakharam had come to the village to meet his parents.

3. It was little past 09:00 p.m. on 13th December, 2014. The informant, Pandurang and his son Sakharam were watering the crops in their respective fields. It is also the case of prosecution that Sakharam invited Jayaji (informant) for dinner at his residence. The informant, therefore, joined him. Both of them were taking dinner in the front yard of their shed-cum-house. Kashibai, mother of Sakharam, was serving them food. All of a sudden two unknown persons first came there. One of them was armed with a dagger. The other one did have a knife with him. Four others followed them. One of the first two assaulted on the arm of Sakharam with the dagger. When Kashibai intervened, the very assailant gave a blow on her chest with the dagger. The four, who followed the first two, also joined in beating up the informant and others. One of them relieved Kashibai of her *mangalsutra*. The other one robbed the informant of his gold pendent worth Rs.5,000/-. Sakharam was robbed of Rs.6,000/- cash and a cell phone. Pandurang was resting in a neighbouring shed. Two of four entered the shed. They also beat up Pandurang. The dacoits thereafter confined the informant, Sakharam and Pandurang in the shed and bolted the door from outside. The dacoits then smashed the glowing electric bulb and then fled.

4. It is also the case of prosecution that both, the informant and Sakharam removed one of the tin sheets of the shed and came out. They

realised Kashibai to have passed away. Sakharam and his father had suffered various injuries. The informant too had suffered injuries. Both, the informant and Sakharam, therefore, came to the village. They related the incident to villagers. They were first rushed to the Government Hospital at Tuljapur. Sakharam and Pandurang were then shifted to Civil Hospital, Osmanabad. They were indoor patients for more than fifteen days. The police visited Government Hospital, Tuljapur and recorded P.W.1 - Jayaji's statement-cum-F.I.R. (Exh.19).

5. Crime vide C.R. No.83 of 2014 was registered with Tamalwadi Police Station, Dist. Osmanabad. The Dacoity Prevention Squad first arrested Pampya (Accused No.1). Involvement of six others was surfaced. The other two appellants were arrested. Four others are still stated to have been absconding. Scene of offence panchanama (Exh.34) was drawn. Autopsy of the mortal remains of Kashibai was conducted. Two test identification parades ('T.I. parade') were held. The appellants were identified by both, the informant and P.W.2 Sakharam. Pursuant to the disclosure statement made by appellant – Pampya, a dagger came to be recovered under the panchanama. While pursuant to the another disclosure statement made by appellant – Balaji, a sum of Rs.4,000/- came to be seized from his residence.

6. During investigation it was revealed that it was a crime committed by an organised crime syndicate headed by appellant – Pampya. Provisions

of Maharashtra Control of Organized Crime Act, 1999 ('MCOC Act') were, therefore, invoked. A prior approval for registration of offence under the MCOC Act was granted. Upon completion of investigation, charge-sheet was filed after obtaining sanction for prosecution for offences under the said Act.

7. The trial Court framed charge (Exh.8) against the appellants herein. As stated above, four others are still absconding. Prosecution examined seventeen witnesses and produced in evidence certain documents. On appreciation thereof, the trial Court convicted the appellants as stated above.

8. Learned counsel for the appellant would submit that the F.I.R. and police statements of the victims are silent to give physical features of the culprits. Before holding of T.I. parade, the informant was summoned to the police station and informed of names and whereabouts of the arrestees. The second T.I. parade was held four months after the alleged incident. The appellants were arrested in some other crime. They were transferred to the crime registered with Tamalwadi police station. The investigating officer did not take efforts to keep the appellants in veil, until before the T.I. parade was conducted. The Executive Magistrates, who conducted the T.I. parades, did not comply with the directions in that regard. The police machinery took active part in holding the T.I. parades. Dummies of different age group, different height and complexion were selected. The second T.I. parade of the appellant was held in one go.

9. A sum of Rs.4,000/- allegedly recovered, pursuant to the statement made by appellant – Balaji, did not bear any earmark to attribute the same to have belonged to Sakharam. No denomination of the currency notes was given either in the F.I.R. or in statement recorded under Section 161 of Code of Criminal Procedure. The seized articles viz. dagger and knife were not sealed, as has been required under the law. Those were sent to the FSL after one month of its seizure. The seizure and consequential C.A. report, therefore lose its legal sanctity. According to learned counsel, the prosecution thus failed to bring home the charge beyond reasonable doubt. He, therefore, urged for allowing the appeals.

10. Learned A.P.P. would, on the other hand, submit that the appellants were identified in T.I. parades. It is an offence of dacoity with murder. It was a continuing unlawful activity of organised crime syndicate headed by appellant – Pampya. The dagger came to be seized pursuant to the disclosure statement made by him. The C.A. report thereof indicates it to have been stained with human blood. The clothes on the person of appellants at the time of commission of the crime were described in the F.I.R. Those too came to be seized. The C.A. reports pertaining thereto also indicate those were stained with blood. The appellants were also identified before the trial Court. The first T.I. parade was conducted within ten days of commission of crime when memory of the informant was fresh. The other two appellants viz. Balaji and Tunya were arrested on 19th December, 2014 and 11th February, 2015, respectively and were identified in second T.I.

parade held at Harsul Central Prison, Aurangabad. Learned A.P.P. ultimately urged for dismissal of appeals.

11. Considered the submissions advanced. Perused the evidence on record and the judgment impugned herein. Let us advert thereto and appreciate the same.

12. Invocation of the provisions of MCOC Act was not seriously taken exception to before the trial Court and this Court as well. P.W.15 – Amitesh Kumar was the then Inspector General of Police, Aurangabad. He granted prior approval under Section 23(1) of the MCOC Act. Same finds place at Exhibit 84. While P.W.14 – Krishanlal Bishnoi was the then Additional Director General of Police (Law and Order), Mumbai. He accorded sanction for prosecution of the appellants and four others for offences punishable under the said Act. Both these witnesses have not been cross-examined. We have, therefore, to conclude that the provisions of MCOC Act have rightly been invoked in the case in hand.

13. According to learned counsel for the appellant, prosecution has failed to make out the offences under the I.P.C. and consequently their conviction for offences under MCOC Act would also fail.

The incident took place by little past 09:00 p.m. on 13th December, 2014 in a shed-cum-room of P.W.2 – Sakharam in his agricultural land at village Yemgarwadi. P.W.1 – Jayaji (informant) would cultivate P.W.2 –

Sakharam's land on crop share basis. He too has his agricultural land adjoining the land of P.W.2 – Sakharam. Just sometime before the incident, both, P.W.1 – Jayaji (informant) and P.W.2 – Sakharam were watering the crops in their respective fields. P.W.1 – Jayaji (informant) joined P.W. 2 – Sakharam on his invitation for dinner. Both of them were taking dinner. Kashibai (deceased), mother of P.W.2 – Sakharam was serving them meal. P.W.2 – Sakharam's father, Pandurand was resting in the adjoining shed.

14. P.W.1 – Jayaji (informant) testified that all of a sudden two persons entered their shed first. It is in his evidence that both of them brandished dagger and knife. They were followed by four others. It is further in his evidence that one of the first two assaulted on P.W.2 – Sakharam's arm with a dagger to compel him to deliver cash and mobile. Kashibai (deceased), P.W.2 - Sakharam's mother, intervened. The very person assaulted on her chest with the dagger. She fell down. One of the first two then assaulted P.W.1. He robbed P.W.1 – Jayaji of gold pendent. P.W.2 – Sakharam was also robbed of his cell phone and cash amounting to Rs.6,000/-. One of the last four entered the neighbouring shed and assaulted Pandurang, father of P.W.2 – Sakharam.

15. On somewhat same lines is the evidence of P.W.2. Both of them identified appellant – Pampya as the one, who assaulted P.W.2 – Sakharam and Kashibai with dagger. P.W.1 – Jayaji identified appellant – Balaji as the one, who assaulted and robbed him of gold pendent. According to P.W.1, it

is appellant – Tunya, who entered the neighbouring shed and assaulted Pandurang. Admittedly, both, P.W.1 – Jayaji and P.W.2 – Sakharam did not see appellant – Tunya to have assaulted Pandurang. Pandurang has not been examined as a witness. There is further evidence to indicate that the dacoits confined P.W.1, P.W.2 and Pandurang in the shed and then bolted it from outside. Both, P.W.1 and P.W.2 had to come out of the shed only after removing one of the tin sheets of the shed, wherein they were confined.

16. Close reading of cross-examination of the prosecution witnesses indicate that the factum of dacoity with murder at the shed in the agricultural land of P.W.2 – Sakharam is undisputed. In the said incident, Kashibai succumbed.

17. In the close neighbourhood of the spot of incident, there was no inhabitat. P.W.1 and P.W.2, therefore, went to the village and returned to the place of incident with some villagers. Police authorities were informed on phone. All of them were first rushed to the Government Hospital at Tuljapur. P.W.2 – Sakharam and his father, Pandurang then were shifted to the Government Hospital at Osmanabad. P.W.8 – Dr. Kshirsagar examined all of them. He too conducted postmortem examination of the mortal remains of Kashibai. He noticed following injuries on her person and the person of P.W.1 – Jayaji, P.W.2 – Sakharam and Pandurang :-

Kashibai :- A) Stab wound on left side of chest, 4.5cm x 2cm, up to the heart. Margins are clear and edges clear cut. After following the tract of stab, there was evidence of purpuration to

heart at middle part 4 x ½ cm x posteral wall. Right lung tissue coming out from 3rd intercostial space.

B) Right ear lobule lacerated from ring puncture side.

Internal injuries :- Left side lung tissue coming partially outside the thorax from intercostal space. There was evidence of hemothorax approximately 800 ml. In left side. There was evidence of blood clots in pericardian, approximately 400 ml. Evidence of perforation of heart anterior to posterial site approximately 4 cm and 1 cm rent posterial. There was evidence of hemoparicardium, approximately 400 ml.

Pandurang :- stab wound with acute bleeding, open chest injury, having 4 x 1 cm. in to lung deep, on right side chest

Sakharam :- (I) Incised wound with acute bleeding, 10 cm x 2 cm to muscle deep. Located on right maxilla going up to right ear.

(II) Incised wound, 4 cm x 1 cm x muscle deep in between web of index and middle finger.

(III) Incised wound 3 x 1 cm x muscle deep on left forearm.

(IV) Incised wound, 1 x 0.5 cm x muscle deep on right forehead.

(All are simple in nature)

(V) Incised wound, 4 cm x 1 cm x muscle behind the right ear. (Grievous injury)

Jayaji :- (I) Incised wound 3 cm x 1 cm x muscle deep, on left forehead.

(II) Incised wound, 2 cm x 0.5 cm x muscle deep on left thumb.

(III) Incised wound 3 x 0.5 cm x muscle deep on left forearm below elbow (posterior).

(IV) Incised wound, 2 x 0.5 cm x muscle deep on right thumb

(V) Stab wound, 1 cm x 0.5 cm x muscle above left shoulder

(VI) Incised wound, 2 x 0.5 cm x muscle deep on right hand wrist.

(All are simple in nature)

18. According to him, Kashibai died due to injury to heart due to stab injury to chest (left) (perforation). Injury certificate of Pandurang (Exh.50) indicates him to have suffered one stab wound with acute bleeding, open

chest injury, having 4 x 1 cm. into lung deep, on right side chest, probably caused by sharp pointed weapon, while injury certificate of Sakharam and Sayaji (Exh.51 & 52 respectively) indicate them to have suffered 5-6 incised injuries, though simple in nature.

19. P.W.4 – Siddheshwar is a witness to the inquest panchanama (Exh.37). The scene of offence panchanama (Exh.34) reinforces the prosecution case of dacoity to have taken place at the residence of P.W.2 – Sakharam.

20. The question is whether the appellants before us have committed the said crime. P.W.1 – Jayaji (informant) identified appellant – Pampya as the one of first two, who arrived brandishing dagger and knife. He also identified him as the one, who assaulted on the arm of P.W.2 – Sakharam and on chest of Kashibai. He then identified appellant – Balaji, who assaulted and robbed him of gold pendent. Both, P.W.1 and P.W.2 identified appellant – Tunya as the one, who entered the neighbouring shed to assault Pandurang.

21. It is P.W.1 – Jayaji, who lodged the F.I.R. (Exh.19) while he was admitted in Government Hospital, Tuljapur. As per the prosecution case, it was the Dacoity Prevention Squab that had first arrested appellant – Pampya on 17th December, 2014, while two other appellants viz. Balaji and Tunya were arrested on 19th December, 2014 and 11th February, 2015, respectively.

P.W.1 – Jayaji was confronted with his F.I.R. (Exh.19). According to him, the culprits were unknown. He was taking information as to whether the dacoits were arrested or not. After they were arrested, he was called to the police station. The F.I.R. (Exh.19) is conspicuously silent to give physical features of the dacoits. The same has been duly brought on record. It has only been reported therein that the dacoits were 5-6 in number and were in the age group of 25-35 years. The F.I.R. is also conspicuously silent to attribute overt acts to the appellants before us, which has been attributed to them by both, P.W.1 and P.W.2 in their examination-in-chief. True, P.W.1 – Jayaji in his evidence before the Court and in the F.I.R. as well gave colours of the clothes on the persons of the dacoits at the relevant time.

22. Appellant – Pampya's T.I. parade was held in a jail at Osmanabad on 23rd December, 2014. P.W.1 – Jayaji only participated therein. He identified appellant – Pampya standing in the row of eight persons including himself (seven dummies). It is further in his evidence that the dummies in the row were of different complexion and height. He stated that he would take information as to whether the dacoits were arrested or not. After their arrest, he was called by police. He, however denied the culprits to have been shown to him by the police. For the T.I. parade that was held on 23rd December, 2014, police had come to take him to jail. First he went to police station and then to District Prison, at Osmanabad. He claimed to have identified appellant – Pampya standing at Sr.No.6 in the row.

23. It is further in his evidence that about 3-4 months thereafter he was again called at Aurangabad for T.I. parade. In the said T.I. parade he identified other two appellants, who were standing in the row at different serial numbers alongwith appellant – Pampya.

24. The evidence of P.W.2 – Sakharam is almost on the lines of evidence of P.W.1 – Jayaji. His evidence, however differs on the count that according to him all the dacoits had come together. He did not claim anyone of them had brandished either dagger or knife. He gave description of colour of clothes on their person. Those were light sky blue colour T-shirt sported by the person armed with the dagger (appellant – Pampya). According to him, appellant – Pampya had assaulted on his arm with the dagger. He then assaulted his mother. It is further in his evidence, the two others started assaulting P.W.1 – Jayaji with knife. He identified appellant – Balaji as one of them. His evidence further indicates that the other two including appellant – Tunya entered the neighbouring shed and assaulted his father – Pandurang. His evidence suggests that he was robbed of a cell phone and sum of Rs.6,000/- in cash. Her mother – Kashibai was relieved of *mangalsutra*.

25. His evidence further indicates that on 16th April, 2015 he identified all the three dacoits in the T.I. parade held at Aurangabad. The said T.I. parade was held in one go. The appellants were standing at Sr. Nos. 2, 10 and 19. He was an indoor patient for little over fifteen days, while his father for about a month.

26. The cross-examination of P.W.2 – Sakharam indicates that he did not give physical features or complexion of the dacoits. According to him, when he paid visit to the police station, the police told him about names of the dacoits and their whereabouts. It were the police, who informed him about T.I. parade to be held. He learnt that the dacoits were of Pardhi community. Deputy Superintendent of Police had accompanied him to Aurangabad for T.I. parade. P.W.1 – Jayaji was with them. It is further in his evidence that some of the dummies placed in the row were dwarf while others were heighted. All of them were of different age group. He again corrected himself to state that they were in the age group of 25-30 years.

27. P.W.2 – Sakharam was confronted with his police statement dated 14th December, 2014, wherefrom following fact has been disclosed :-

“I did not tell them about details of faces of dacoits.”

Same indicates P.W.2 – Sakharam to have neither given complexion nor described the dacoits in his statement to the police.

28. P.W.11 – Sunil was a witness to the T.I. parade dated 23rd December, 2014. His evidence suggests that P.W.1 – Jayaji identified appellant – Pampya while he (Pampya) was standing at Sr.No.4. According to him, the arrangements made were such that no one could get glimpse of the suspects before the T.I. parade was held. His evidence, however indicates that Tahsildar, who conducted the T.I. parade, both the panchas and P.W.1 had entered the jail premises together. They were together until

conclusion of T.I. parade. He went on to state that the dacoits in that row were of different age group.

29. P.W.16 – Kashinath, the Tahsildar, who conducted the first T.I. parade dated 23rd December, 2014 was not examined by the prosecution in examination-in-chief, since the T.I. parade panchanama came to be admitted in evidence. He was, however summoned for cross-examination. It is in his evidence that he did not make any correspondence with the jail authorities for fixing date for T.I. parade or any arrangement with respect thereto. He did not mention age of the accused to be identified in T.I. parade. He did not choose the dummies for the T.I. parade to be held. According to him, the dummies selected were of different age group. The panchas were with him. He, however denied to have not observed the directions as regards T.I. parade given in the criminal manual.

30. P.W.13 – Manik was the Nayab Tahasildar at the relevant time. He conducted the second T.I. parade in Harsul Central Prison, Aurangabad on 16th April, 2015. According to him, both, P.W.1 – Jayaji and P.W.2 – Sakharam identified the appellants in the T.I. parade. His evidence further indicates that the said T.I. parade was held in one go. The dummies were of different age group. They were of different complexion, height and features. He denied to have not complied with the directions as regards holding of T.I. parade. His evidence further indicates that the T.I. parade was first scheduled to be held on 19th March, 2015. Same was, however posponed to 16th April, 2015.

Recoveries :-

31. P.W.3 – Javed was a witness to the disclosure statement (Exh.28) made by appellant – Balaji pursuant to which a sum of Rs.4,000/- came to be recovered from his house under panchanama (Exh.29). On the same lines is the evidence of P.W.17 – Sayyed Asif, Investigating Officer. Admittedly, the description of currency notes had not been given either in the F.I.R. (Exh.19) or in the police statements of P.W.1 – Jayaji and P.W.2 – Sakhamam respectively. The seized currency notes, therefore, could not be held to be the stolen property.

32. P.W.6 – Ananda was a witness to the seizure of clothes. It is in his evidence that on 17th December, 2014, appellant – Pampya delivered to police clothes like shirt with lines thereon and jean pant. According to him, there were blood stains thereon. The police seized those clothes under panchanama (Exh.42). Then he was again called on 22nd December, 2014. One Vinod Jogdand delivered blood stained clothes of his father and brother. Those were seized under panchanama (Exh.43).

33. Cross-examination of this witness, however indicates that the clothes which were seized by the police under panchanama (Exh.42) were already kept below the table. So far seizure of the clothes thereafter is concerned, his evidence indicates that the police had told him the clothes to have already been seized. He was asked to sign the panchanama in that regard.

34. P.W.7 – Hanumant is a witness to the disclosure statement made by appellant – Pampya, pursuant to which a dagger came to be seized from under a fodder at one babul tree. The disclosure statement made by appellant – Pampya is at Exhibit 45. The seizure panchanama of dagger finds place at Exhibit 46.

35. The evidence of this witness indicates that the label containing his signature and that of other pancha was affixed on the handle of the dagger. His evidence is conspicuously silent to indicate the dagger to have been seized, wrapped and then sealed as per police procedure. The seizure panchanama too discloses non-compliance of the seizure procedure.

36. P.W.9 – Shivraj and P.W.10 – Dilip were the witnesses to the panchanama regarding disclosure statement by appellant – Tunya and recovery of a knife. Both these witnesses did not stand by the prosecution. The relevant panchanamas have been admitted in evidence only to the extent of proof of signature of these witnesses (Exh.58 and 59).

37. P.W.11 – Raju is a witness to the seizure of clothes delivered by accused Shinde. This witness even did not give first name of any of the appellants. While two of the three appellants have common surname, Shinde. The clothes seizure panchanama is at Exhibit 63.

38. P.W.12 - Sachin is a Nodal Officer serving with Idea Cellular Company. He produced in evidence certain documents in the nature of Call

Data Record (C.D.R.), documents submitted to the cellular company by the concerned consumers for obtaining SIM cards, etc. He also produced certificate under Section 65B of the Evidence Act along therewith.

39. Close reading of these documents indicate that none of the cell phones was either seized from any of the appellants nor the SIM cards stand in either their names or names of their family members. The C.D.Rs. Were not relied on. We fail to understand as to how the Investigating Officer could get lead based on these documents first to arrest appellant – Pampya as a suspect involved in the dacoity.

40. P.W.17 – Sayyed Asif is the Investigating Officer. According to him, appellant – Pampya was first arrested by the Dacoity Protection Squad on 19th December, 2014. It is, however not known as to why the T.I. parade relating to appellant – Balaji was not held alongwith the T.I. parade of appellant – Pampya, which was held on 23rd December, 2014. According to him all the seized articles were sent to FSL for analysis and report. The police officer, who carried the articles has not been examined. The articles were sent one and half month after the incident. True, the other C.A. reports regarding seized clothes indicate blood stains thereon. The clothes were, however many in number. All the articles were sent to FSL on 30th January, 2015 i.e. about one and half month after the incident.

Appreciation :-

41. True, an unfortunate incident of dacoity took place at a shed-cum-house of P.W.2 – Sakharam in his field at village Yemgarwadi by little past 09:00 p.m. on 13th December, 2014. Kashibai, mother of P.W.2 – Sakharam passed away. P.W.1 – Jayaji, P.W.2 – Sakharam and Pandurang, father of P.W.2 were severely injured. It was an offence of dacoity with murder and related offences. P.W.1 – Jayaji lodged the F.I.R. (Exh.19). Same is, however silent to record therein physical features of the dacoits. Same is the case about police statement of P.W.1 – Jayaji. He admitted that on arrest of appellant – Pampya, he was called to the police station. True, he denied Pampya to have been shown to him. It is, however not known as to why P.W.1 – Jayaji was summoned to police station after arrest of appellant - Pampya. His evidence, however indicate that although he identified Pampya in T.I. parade, the dummies were of different complexion and height. According to the Executive Magistrate, who held the T.I. parade, the dummies were provided by the jail authorities. The currency notes seized pursuant to the disclosure statement made by P.W.7 - Hanumant cannot be said to be the stolen property since no description of denominations of the seized currency notes figure in the F.I.R. or in the police statement of P.W.2. The second T.I. parade was held about four months after the incident of dacoity. P.W. 18 – Vidhate, Investigating Officer did not offer any explanation as regards delay. There is no evidence to indicate the appellants were kept in veil until T.I. parade was held. There is further

evidence to indicate the police officers to have played role in conducting the T.I. parade.

42. The second T.I. parade was held about four months after the incident of dacoity. The Investigating Officer did not offer any explanation as regards delay in conducting the T.I. parade. There is also no evidence to indicate the appellants to have been kept in veil until before their T.I. parade was held. The evidence also indicates that the police authorities had played role in holding this T.I. parade as well. They had accompanied P.W.1 and P.W.2 to the jail.

43. So far as regards recovery of dagger at the instance of appellant – Pampya is concerned, the evidence indicates that a label bearing signature of witness was affixed only on its handle. No procedure which is required to be complied with by the police officers as regards seizure of any article, has been followed. The seized articles were sent to the F.S.L. about one and half month after the incident. The seized clothes were very many in number. The panchas as regards seizure panchanama thereof stated the clothes were already there in the custody of the police. The signatures were simply obtained on the panchanamas in that regard.

44. Admittedly, appellant – Pampya was arrested by the Dacoity Prevention Squad. There is no evidence to indicate on the basis of what material his involvement in the dacoity in question was suspected. According to prosecution, it is the C.D.Rs. of the cell phones allegedly used by the

appellants and others that gave lead in the investigation of crime. There is, however no evidence in that regard.

45. Clause 16 of the Criminal Manual pertains to Identification Parades. Relevant clauses of sub-clause 16(2) thereof are as under :-

- “(a)
- (b)
- (c) *The Officer concerned with the case against the suspect, if present, must not take part in conducting the parade.*
- (d) *The parade should be arranged by an officer who is not a police officer.*
- (e) *After the commencement of the identification parade, every thing in respect of it should take place in the presence and hearing of the suspect, including any instruction to the witnesses attending it as to the procedure that is to be adopted.*
- (f)
- (g)
- (h) *The suspect should be placed among persons (if practicable eight or more) who are as far as possible of the same age, height, general appearance (including standard of dress and grooming) and position in life. Two suspects of roughly of similar appearance should be paraded with atleast twelve other persons. Where, however, the two suspects are not similar in appearance or where there are more than two suspects, separate parades should be held using different person on each parade.*
- (i) *All members of a group of suspects more than two should not be paraded together. There should be more parades than one, each including not more than two. Two suspects of obviously dissimilar appearance should not be included in the same parade. Identification numbers should be concealed.”*

46. Apex Court in case of **Subhash and Shiv Shankar Vs. State of U.P., AIR 1987 SC 1222** has held as under :-

“(A) Penal Code (45 of 1860), S.300 – Evidence Act (1 of 1872), S.9 – Charge of murder – Test identification parade – Evidentiary value – Parade held after delay of four months – Witnesses not giving any description of accused either in FIR or in their statements during investigation – Conviction cannot be based solely on such identification – Accused has to be given benefit of doubt.”

47. Apex Court in its recent judgment in case of ***Gireesan Nair & Ors. Vs. State of Kerala, DLD (Cri)–2022-1855*** has held as under :-

- “A) TIP must be held without avoidable and unreasonable delay after the arrest of the accused, this becomes necessary to eliminate the possibility of the accused being shown to the witnesses before the test identification parade.
- B) Cases where witnesses have had ample opportunity to see the accused before the identification parade is held, it may adversely affect the trial.
- C) If witnesses had opportunity to see the accused before the TIP, be it in any form, i.e. physically, through photographs or via media, evidence of the TIP is not admissible as valid piece of evidence.
- D) TIP conducted in the presence of a police officer is inadmissible in light of S.162 Cr.P.C.
- E) It is for the prosecution to prove that a TIP was conducted in a fair manner and that all necessary measures and precautions were taken before conducting the TIP.
- F) When the TIP is vitiated, conviction cannot be upheld.”

48. In case of ***Ramcharan Bhudiram Gupta Vs. State of Maharashtra, 1995 Cri.L.J. 4048***, this Court has held as under :-

“(A) Evidence Act (1 of 1872), S.9 – Identification evidence – Can be relied upon only if chances of suspects being shown to witnesses before the test are totally absent”

In view of aforesaid legal preposition and the fact that T.I. parade in question was held very late and the police to have played some role in holding the T.I. parade, the same loses its efficacy.

49. The aforesaid analysis of the evidence in the light of the judgments referred to hereinabove lead us to conclude the prosecution to have failed to bring home the charge beyond reasonable doubt. Based on such kind of evidence, the trial Court ought not to have convicted the appellants. We are, therefore, not at one with the findings recorded by the trial Court. Interference with the impugned order of conviction and consequential sentence is, therefore, warranted.

50. In the result, the appeals succeed. The appeals are allowed in terms of following order :-

ORDER

- (I) Both the criminal appeals are allowed.
- (II) Impugned judgment and order of conviction for the offences punishable under Sections 396 and 397 of the Indian Penal Code and Sections 3(1)(i), 3(2), 3(3) and 3(4) the Maharashtra Control of Organized Crime Act, 1999 and consequential sentences therefor imposed against the appellants dated 04th February, 2019 passed by Special Judge, MCOC Act, Aurangabad in Special Case No. 2 of 2015, is hereby set aside.

- (III) The appellants stand acquitted thereof.
- (IV) The appellants be released forthwith, if not required in any other case.
- (V) Fine amount paid by the appellants, if any, be refunded to them.

SSD (NEERAJ P. DHOTE, J.)

(R.G. AVACHAT, J.)